Supreme Court, U.S
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No. 93-1599

In the Supreme Court of the United States

OCTOBER TERM, 1993

TOM HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process when the district court declined to bifurcate the jury deliberations on guilt and forfeiture.

2. Whether the district court deprived petitioner of a unanimous verdict on the false statement charges by refusing to give petitioner's special unanimity instruction in addition to the general unanimity instruction.

3. Whether two counts charging petitioner with thefts from programs receiving federal funds were multiplicitous.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is unpublished, but the decision is noted at 12 F.3d 215 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. Petitions for rehearing filed by two co-defendants were denied on January 7, 1994. Pet. App. A21-A22. The petition for a writ of certiorari was filed on April 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on three counts of conspiring to defraud the United States, in violation of 18 U.S.C. 371; three counts of obstructing a federal audit, in violation of 18 U.S.C. 1516; eight counts of money laundering, in violation of 18 U.S.C. 1957; 15 counts of making false statements, in violation of 18 U.S.C. 1001; two counts of theft concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A); one count of paying kickbacks for the referral of patients, in violation of 42 U.S.C. 1320a-7b(b)(2)(A); and one count of making false claims, in violation of 18 U.S.C. 287. He was sentenced to 57 months' imprisonment, to be followed by three years of supervised release. He was also sentenced to forfeit $191,206.80 to the United States, and ordered to pay $4,464,697.25 in restitution. The court of appeals affirmed. Pet. App. A1-A20.

1. Petitioner owned and operated Tennessee Health Services, Inc. (THS), which was the home office for several Home Health Care Agencies (HHCA) he also owned, including First Tennessee In-Home Care; Mid-Cumberland Home Health; Doctors Home Health, Inc.; South Central Home Health; and South West Home Health, Inc. Petitioner controlled the accounts of all of his HHCAs except for South Central, which was independently operated by his brother and co-defendant, James Henry. Pet. App. A2; Gov't C.A. Br. 5.

Petitioner's HHCAs were licensed by Medicare, which is administered by the United States Department of Health and Human Services (HHS). HHS contracts with insurance companies, called "intermediaries," to run the Medicare program, including paying Medicare funds to

health care providers (such as HHCAs), and conducting audits. The Medicare program reimburses health care providers for the reasonable cost of direct patient care and overhead expenses. Pet. App. A2-A3.

Each HHCA receives Medicare funds through an intermediary a number of times a year based upon the HHCA's Medicare claims for the prior year. At the end of each fiscal year, the HHCA submits a cost report to the intermediary that summarizes that year's Medicare expenses. The intermediary reviews the report and the HHCA and Medicare settle their accounts; the HHCA repays Medicare if the funds received exceeded actual costs, and Medicare reimburses the HHCA if the costs exceeded the Medicare funds already disbursed. Pet. App. A2.

Petitioner and his two co-defendants engaged in several schemes that enabled them to receive Medicare funds to which they were not entitled. The first scheme related to petitioner's efforts to be reimbursed for profits made by other entities he controlled. The Medicare program limits reimbursement for goods and services provided to an HHCA by a related company—*i.e.*, a company owned or controlled by that HHCA's owner—to the reasonable cost of the goods and services only, with no reimbursement for the related company's profit. Petitioner, however, repeatedly sought and received Medicare reimbursement for profits earned by companies that he controlled in the course of their business with his HHCAs. Pet. App. A3; Gov't C.A. Br. 5. In so doing, he falsely certified that the HHCAs had not conducted any transactions with related parties. Pet. App. A4; Gov't C.A. Br. 6-7.[1]

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[1] For example, in 1988, petitioner purportedly bought 50% and co-defendant David Jones bought 25% of Argus Medical Supplies,

Petitioner's second scheme to receive Medicare funds illegally involved his payment of a monthly fee to several physicians to refer patients to his HHCAs. In 1988, petitioner paid $50,000 for those referrals. The 1988 Medicare cost report for his Mid-Cumberland Home Health claimed that sum as an expense for "medical advisors." Pet. App. A4; Gov't C.A. Br. 8-9.

Petitioner's third scheme began in 1989, when he and co-defendant David Jones hired accountant Dan Miller. In preparing the HHCAs' Medicare cost reports for 1988, Miller discovered that Medicare had overpaid the HHCAs by $300,000. At Jones's direction and in order to avoid reimbursing Medicare, Miller increased the salaries listed in the cost reports of several HHCAs to make it appear that the employees had received bonuses. For example, the records showed $230,000 in bonuses

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Inc. (Argus), from Sidney Ford, a relative of petitioner's. No money changed hands. Petitioner directed his HHCAs to purchase medical supplies from Argus, which marked up its prices 65%. Similarly, at his direction, petitioner's HHCAs purchased medical equipment from another of petitioner's businesses, and leased vehicles and equipment from a company partly owned by petitioner. The annual cost reports filed by petitioner for his HHCAs charged Medicare for all costs and profits paid in those transactions, falsely certifying that the HHCAs had not conducted any transactions with related parties. Pet. App. A4; Gov't C.A. Br. 6-7.

Petitioner repeated the scam in 1989, when he and Jones formed Datom International to manage the HHCAs, and Datom Business Services to provide them with accounting services. In order to receive Medicare reimbursement for the Datom companies' profits, petitioner purportedly agreed to sell both THS and the HHCAs to John Greer, Jr., for $25,000. That transaction, however, was a sham. Greer paid nothing and petitioner and Jones continued to control the HHCAs. Pet. App. A3-A4; Gov't C.A. Br. 7-8, 14.

paid to Mid-Cumberland Home Health employees, $90,500 in bonuses paid to Doctors Home Health employees, and $12,500 to South Central Home Health employees. None of the employees had in fact received any bonuses. The 1987 cost reports for several of the HHCAs also listed employee bonuses that had, in fact, never been paid. Pet. App. A4-A6; Gov't C.A. Br. 9-10, 12.

Medicare audited the 1987 and 1988 cost reports of a number of petitioner's HHCAs. Much of the documentation petitioner submitted to the auditors was false. For the 1987 cost reports, petitioner directed Miller to provide the auditors with bogus bank statements and bogus checks, including checks that had not cleared the bank and checks altered by petitioner. For the 1988 cost reports, petitioner had Miller prepare backdated notes of financial obligation that purported to reflect bonuses due to the HHCA employees and that contained forgeries of the employees' initials or signatures. Board minutes showing the approval of the bonuses were backdated and signed by petitioner and his brother. Jones instructed Miller to prepare merit pay schedules that ostensibly showed the payment of the bonuses, but that actually listed the employees' regular pay checks. In addition, the 1988 cost report for Doctors Home Health listed $1,100 in rent to each of two churches; in fact, $1,600 of the total was paid directly to the two churches' ministers for referring their parishioners to the HHCA. The 1988 THS cost report also included as mileage expenses petitioner's (and friends') vacation in Cancun, Mexico. Pet. App. A5-A6; Gov't C.A. Br. 11-13.

Finally, at petitioner's direction, the HHCAs under his control submitted altered claims to Medicaid for co-insurance payments for Medicare patients. The Medicaid program pays co-insurance on Medicare

patients only for the purchase of medical equipment and supplies. Of the $1 million in claims submitted by petitioner's HHCAs to Medicaid, only $12,000 was legitimate. Pet. App. A6; Gov't C.A. Br. 14-15.

2. Petitioner was charged in a 36-count indictment that included forfeiture allegations pursuant to 18 U.S.C. 982(b)(1)(A) (Supp. IV). The government sought the forfeiture of property and currency equivalent to $191,206.80, which represented the aggregate amount of the federal funds that petitioner took from THS to purchase his personal residence and an adjacent lot. Gov't C.A. Br. 15; Superseding Indictment. The jury convicted petitioner on 33 counts and ordered forfeiture of the total amount sought. Gov't C.A. Br. 3. At the sentencing hearing, after hearing testimony regarding the losses suffered by Medicare and Medicaid as a result of the schemes charged in the counts of conviction, the court also ordered petitioner to pay $4,464,697.25 in restitution to the government.

3. The court of appeals affirmed. Pet. App. A1-A20. In response to petitioner's claim that the jury instruction on the false statements counts failed to ensure jury unanimity, the court held that the jury charge "fully comported with traditional notions of fundamental fairness and due process," and was not erroneous. *Id.* at A9-A10. The court also upheld petitioner's convictions on counts 4 and 5, each of which charged him with theft from programs receiving federal funds, in violation of 18 U.S.C. 666. Pet. App. A12-A14. The court found that although the schemes charged in the two counts overlapped in time, one scheme was designed to enable him to purchase real estate, and the second was to obtain funds to pay personal expenses. *Id.* at A12. Thus, the court held, counts 4 and 5 were not multiplicitous. *Ibid.*

The court also rejected petitioner's contention that the district court violated his right to due process by refusing to bifurcate from the rest of the case the jury deliberations on the forfeiture count, which required proof only by a preponderance of the evidence. Pet. App. A14. The court held that the district court did not abuse its discretion in refusing to bifurcate, particularly when the trial judge repeatedly emphasized to the jury that the issues of guilt and forfeiture were to be determined separately. *Ibid.* The court rejected all of petitioner's other claims. *Id.* at A7-A20.

ARGUMENT

1. Petitioner renews his contention (Pet. 8-10) that he was denied due process by the district court's failure to bifurcate the jury's deliberations on guilt and on criminal forfeiture. This Court has already held that a unitary guilt and punishment proceeding does not violate a defendant's due process rights. *McGautha* v. *California*, 402 U.S. 183, 208-222 (1971), vacated in part on other grounds, 408 U.S. 941 (1972). While petitioner claims that the courts of appeals are divided on whether bifurcation is required, petitioner did not establish any of the circumstances that have led some courts of appeals to suggest or require bifurcation in specific cases.

In determining whether a criminal forfeiture count and a substantive count should be bifurcated for trial, the courts of appeals generally have looked to the complexity of the evidence and the potential for jury confusion, whether there are evidentiary difficulties, or whether the privilege against compelled self-incrimination is clearly implicated. *United States* v. *Feldman*, 853 F.2d 648, 662 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989); see *United States* v. *Sandini*, 816 F.2d 869, 873-874 (3d Cir. 1987) (requiring bifurcation in order to accom-

modate defendant's right to remain silent); see also *United States* v. *Desmarais*, 938 F.2d 347, 349 (1st Cir. 1991) (collecting cases). While recognizing that a bifurcated trial is not constitutionally required, see *Feldman*, 853 F.2d at 661 (citing *McGautha*); *Sandini*, 816 F.2d at 874 (same), some courts have expressed a preference for bifurcation, see *United States* v. *Jenkins*, 904 F.2d 549, 559 (10th Cir.), cert. denied, 498 U.S. 962 (1990); *Feldman*, 853 F.2d at 662; *United States* v. *Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), and the Third Circuit has invoked its supervisory powers to require bifurcation of the trial when necessary to accommodate the defendant's desire to testify as to the forfeiture counts, see *Sandini*, 816 F.2d at 873-874.[2]

None of the concerns that have produced bifurcation orders in the lower courts is present here, and there is thus no need to examine in this case the differing approaches taken by the courts of appeals. Petitioner did not seek a true bifurcation of the trial, but merely "bifurcation" of the jury deliberations. The "bifurcation" sought by petitioner was effectively accomplished by the district court's instructions, which required the jury to consider any forfeiture issues only if it first found petitioner guilty of the substantive money-laundering offenses.[3] The court also clearly instructed the jury that

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[2] Several courts have left the issue to the sound discretion of the district court, see *United States* v. *Linn*, 880 F.2d 209, 217 (9th Cir. 1989); *United States* v. *Perholtz*, 842 F.2d 343, 367 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988). Cf. *United States* v. *Smith*, 966 F.2d 1045, 1048-1049 (6th Cir. 1992).

[3] The court instructed the jury:

> If and only if you have found the defendant TOM HENRY guilty of any of the crimes alleged in Counts Six through

the government's burden of proof on the forfeiture count differed from, and was lower than, its burden of proof on the substantive counts, and that the jury should be certain to distinguish the two: "Remember, as to the other counts [the substantive counts], the government must prove its case beyond a reasonable doubt." Jury Instructions at 63. Moreover, the nature of petitioner's schemes was not particularly complex or difficult to grasp. Nor did petitioner express an interest in testifying with respect to the forfeiture allegations. In these circumstances, petitioner's claim that jury deliberations should have been bifurcated would not prevail in any circuit.

2. Petitioner again contends (Pet. 10-15) that he was deprived of a unanimous verdict on the false statements counts by the district court's refusal to give the special unanimity instruction requested by the defendants. The court of appeals properly rejected that claim.

Petitioner was charged in counts 14 through 29 with submitting to Medicare HHCA cost reports that contained false and fictitious statements, in violation of 18 U.S.C. 1001, in that the cost reports included, as reimbursable costs, expenditures that were not reimbursable by Medicare, or falsely stated that the HHCA had had no related party transactions in that year. At the charging conference, defense counsel requested that the court instruct the jury only on that clause of Section 1001 with which petitioner and his co-defendants were charged ("makes or uses any false

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> Thirteen, go on to consider Count Thirty-Six [forfeiture]. If you have found the defendant TOM HENRY not guilty of Counts Six through Thirteen, you must find the properties listed in Count Thirty-Six are not forfeit.

Jury Instructions at 62 (emphasis omitted).

writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry"). 37 Tr. 2704-2709. The court agreed. No objections were made to the court's unanimity instruction, which the court then gave at the end of its instructions to the jury:

> Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

39 Tr. 3066.

On the second day of deliberations, the jury asked the following question:

> In Count Fourteen, where it reads "he then and there well knew all costs listed on the cost [report] were not reimbursable" does "all" mean the total amount or part of the $370,590?[4]

40 Tr. 3124. Over the objection of one co-defendant, the court advised the jury that "Count Fourteen does not mean that that entire amount was false, but that that was the amount on the cost report." 40 Tr. 3125-3126. It

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[4] Count 14 charged:

> On or about June 11, 1988, in the Middle District of Tennessee, TOM HENRY, in a matter within the jurisdiction of the United States Department of Health and Human Services, knowingly and willfully made or used a false document knowing that the document contained false and fictitious statements and entries in that TOM HENRY submitted a cost report to Medicare for the year 1987 for Tennessee Health Services, Inc., which cost report stated that $370,590 was expended in reimbursable costs when in truth and fact as TOM HENRY then and there well knew all costs listed on the cost report were not reimbursable.
>
> In violation of Title 18, United States Code, Section 1001.

was only then that petitioner and his co-defendants filed proposed special unanimity on instructions that would require the jury to agree unanimously which costs were not reimbursable and which parties were "related parties." The court denied the request for supplemental instructions. Pet. App. A9. The jury acquitted petitioner on Count 14.

Under Fed. R. Crim. P. 30, petitioner was required to object to any defect in the court's charge during the charging conference, before the jury retired to deliberate. Petitioner tendered no special unanimity instruction at that time, and the sole objection raised to the charge on the Section 1001 counts was accepted by the court.[5] Any claim predicated on the court's failure to give a special unanimity instruction is therefore waived.

In any event, the court properly instructed the jury on the issue of unanimity. There is no general requirement of jury unanimity "on the preliminary factual issues which underlie the verdict." *Schad* v. *Arizona*, 111 S. Ct. 2491, 2497 (1991) (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)). Thus, it has "long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Schad* v. *Arizona*, 111 S. Ct. at 2506 (Scalia, J., concurring). A special unanimity instruction is required only when there is a genuine risk of juror confusion or of conviction resulting from different jurors' concluding that the defendant committed

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[5] The petition implies (Pet. 11-12) that the unrelated objection that was made to the Section 1001 instructions during the charging conference addressed the matter that petitioner seeks to raise in this Court, and that the special unanimity instruction was filed promptly thereafter, before the jury retired. Neither is correct.

different acts. *Jeffries* v. *Blodgett*, 988 F.2d 923, 937, opinion amended, 5 F.3d 1180 (9th Cir. 1993), cert. denied, 114 S. Ct. 1294 (1994); *United States* v. *Sayan*, 968 F.2d 55, 65 (D.C. Cir. 1992); *United States* v. *Holley*, 942 F.2d 916, 925 (5th Cir. 1991), cert. denied, 114 S. Ct. 77 (1993); see *United States* v. *Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992).

There was no danger of confusion here. The gravamen of petitioner's Section 1001 violation was the submission to a government agency of a document containing false statements. Contrary to petitioner's contentions (Pet. 12-13), it does not matter how many of the costs included in the report were not reimbursable, or which costs involved transactions with related parties. Those are not distinct acts, but instead are separate means of committing the same crime. Cf. *Sanderson*, 966 F.2d at 187 (different acts that constitute single course of criminal conduct under 18 U.S.C. 666). Because the jury unanimously found that petitioner knowingly submitted to Medicare cost reports that contained false statements or entries, there was no "genuine risk" of juror confusion, and the court's general unanimity instruction was sufficient to ensure that the jury was unanimous on the factual basis for those convictions. See *Jeffries*, 988 F.2d at 937; *United States* v. *Jackson*, 879 F.2d 85, 89 (3d Cir. 1989); see also *Holley*, 942 F.2d at 926; *United States* v. *Beros*, 833 F.2d 455, 460 (3d Cir. 1987).

3. Petitioner also renews his claim (Pet. 15-18) that counts 4 and 5, which charged him with theft from programs receiving federal funds, must be dismissed because they were multiplicitous. Petitioner did not raise that issue in the district court, and therefore his claim is reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Young*, 470 U.S. 1, 15-16 (1985). The plain error doctrine encompasses only

"particularly egregious" errors that result in a "miscarriage of justice." See *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982). Petitioner cannot demon-strate plain error here.

Multiplicity is the charging of a single offense in more than one count. *United States* v. *Song*, 934 F.2d 105, 108 (7th Cir. 1991). Whether an indictment is multiplicitous therefore turns on the unit of prosecution established by Congress in the particular statute. *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978). Section 666(a)(1)(A) provides that whoever, being an agent of an organization that receives more than $10,000 in benefits from a federal program in any one-year period:

> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that —
>
> (i) is valued at $5,000 or more, and
>
> (ii) is owned by, or is under the care, custody, or control of such organization * * *

shall be fined, imprisoned, or both. Count 4 charged petitioner with obtaining funds by fraud from THS, which received Medicare monies, from July 1989 to July 1990, in order to purchase personal real estate; count 5 charged him with obtaining funds from THS by fraud in 1989 in order to pay his personal expenses.

Nothing in Section 666 suggests that multiple embezzlements or fraudulent takings of funds in any one year from an organization that receives Medicare funds constitute a single offense. Contrary to petitioner's contention (Pet. 18), the $5,000 threshold is a jurisdictional limit, not a statement of the unit of prosecution. Although the time during which the violations charged

in counts 4 and 5 occurred overlapped to some extent, the two counts involved two separate schemes to violate 18 U.S.C. 666—one intended to pay petitioner's personal expenses and one intended to buy his home and adjacent real estate. Accordingly, the court of appeals correctly concluded that the two schemes constituted a proper basis to charge them as separate offenses.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner's claim (Pet. 15) that the purported multiplicity of counts 4 and 5 also requires dismissal of counts 6 through 13 (money laundering) and 36 is without merit. Petitioner has not claimed that counts 6 through 13, which are based upon the unlawful activity alleged in count 4, are multiplicitous by themselves. Count 4 merely describes the specified unlawful activity from which the property involved in the money laundering was derived. Conviction on the money laundering counts is not, therefore, dependent upon petitioner's conviction on count 4.